UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD ZYBURO, on behalf of himself and all others similarly situated, Plaintiff, v. NCSPLUS INC., Defendant.	CASE NO: 12-cv-06677 (JSR)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff, Edward Zyburo ("**Plaintiff**" or **"Class Representative"**), respectfully submits this Memorandum of Law in support of his Motion for Final Approval of the class settlement reached in this case. A separate motion has been filed with the Court seeking an award of reasonable attorneys' fees, costs and expenses, and a service award to the Plaintiff as Class Representative.

I. INTRODUCTION

The Stipulation of Settlement ("**Settlement**"), which was preliminarily approved by the Court in its order dated March 16, 2015 (Doc. 103), provides for the payment of one-million, eight-hundred thousand dollars ($1,800,000.00) in cash ("**Settlement Fund**") for the benefit of Plaintiff and the Class.

Plaintiff asserts that the proposed Settlement is fair, reasonable and adequate and should be given final approval. The Settlement was achieved only after extensive litigation, comprehensive discovery, and mediation, which was held on the eve of trial. The Settlement is an excellent result for Plaintiff and the Class, given Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class beyond Defendant's insurance coverage, which is a wasting policy issued by Continental Casualty Company ("**Continental**") in the amount of $2,000,000.00[1], the attendant risks and uncertainty of litigation in complex cases such as this one, and the difficulties and delays inherent in such litigation if Defendant was to seek appellate review of the Court's Final Judgment in the event that Plaintiff and the Class were successful at trial. The Settlement provides an immediate and significant recovery for the Class in the form of a Settlement Fund in the amount of $1,800,000.00, which will be funded entirely from the Continental policy. This amount represents almost all of the remaining coverage under Defendant's wasting policy, and was accepted following Plaintiff's confirmation that Defendant has no meaningful assets that could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim did not exist in connection with Continental's handling of the claim for coverage under Defendant's policy. The Settlement will result in the dismissal of Plaintiff's class action complaint with prejudice, and the release of the claims against Defendant in the case.

As outlined herein, Class Counsel has conducted an extensive investigation of the claims and the underlying events alleged in the Complaint, engaged in aggressive and probing discovery, consulted with an expert on the factual issues who was prepared to testify at the trial of this case, and researched the applicable law with respect to the claims of Plaintiff and the Class against Defendant, and the potential defenses thereto. Based on this factual and legal investigation, Plaintiff and Class Counsel have concluded that the terms and conditions of the

[1] The term "wasting" refers to provisions within general liability policies which cause the overall limits of coverage to be reduced by the incurred defense costs. Here, the more that this case is litigated, including at trial and any subsequent appeals, the sum available under the Continental policy will be reduced to pay the fees, costs and expenses of Defendant's counsel.

Settlement are fair, reasonable and adequate to Class Members, and they respectfully request that the Court approve the Settlement.

II. FACTUAL BACKGROUND

A. Nature of the Claims and Procedural History

Although the history of this litigation is set forth in Plaintiff's motion seeking preliminary approval of the Settlement now before the Court, an additional recitation is important for the discussion which follows.

On August 31, 2012, Plaintiff filed this class action lawsuit in the United States District Court for the Southern District of New York ("**Court**"). The Complaint alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. ("**TCPA**"), and sought certification of the proposed Class, statutory damages, injunctive relief, and an award of attorneys' fees and costs on behalf of Plaintiff and the proposed Class. (Doc. 1). Defendant answered the Complaint on September 15, 2012. (Doc. 6). On March 5, 2013, Plaintiff filed his Motion for Class Certification and supporting documents. (Docs. 19, 20, 22 and 23). Defendant opposed the Motion, and Plaintiff replied in support of his Motion. (Docs. 24 and 27).

Plaintiff proceeded to serve written discovery requests. In its responses, Defendant repeatedly represented that it had no insurance and, therefore, would be unable to cover any class-wide damages. Relying on this representation, Plaintiff petitioned the Court to withdraw his pending Motion for Class Certification and to drop the class claims pled in his original Complaint. (Doc. 29). On April 5, 2013, the Court held a conference on this issue, accepted Plaintiff's petition in full, and instructed the Clerk to close Plaintiff's pending Motion for Class Certification. *Id*. On April 22, 2013, Plaintiff filed his Amended Complaint, alleging individual claims for negligent violations of the TCPA (Count I), knowing and/or willful violations of the TCPA (Count II), and violations of the Fair Debt Collection Practices Act (Count III). (Doc. 28).

On July 17, 2013, Plaintiff took the Rule 30(b)(6) deposition of Christopher Rekhow, a co-owner of Defendant. During the deposition, Rekhow divulged that, contrary to prior representations, Defendant did have insurance. (Doc. 65, Ex. A). A copy of the insurance policy, issued by Continental Casualty Company on November 15, 2011 and providing miscellaneous professional liability coverage in the amount of $2,000,000, was subsequently provided to Plaintiff's counsel. (Doc. 65, Ex. B). On July 23, 2013, the parties contacted the Court regarding Defendant's belated and contradictory revelation of insurance coverage. The Court held an evidentiary hearing on this matter, which began on October 3, 2013, and continued on October 18, 2013. (Doc. 45). At the hearing, Christopher Rekhow and Lynn Goldberg – co-owners of Defendant – admitted that they had jointly concealed the existence of the insurance policy from their counsel. (Docs. 45 and 46). As a direct result of this concealment, Defendant's discovery responses failed to disclose that Defendant had an insurance policy. *Id.* On October 23, 2013, the Court reinstated the original class action Complaint and Motion for Class Certification, and permitted Plaintiff to submit an application for reimbursement of fees and costs arising from Defendant's misconduct. (Doc. 45).

On November 5, 2013, Plaintiff applied to the Court for fees and costs incurred as a result of Defendant's misconduct, and on May 1, 2014, the Court ordered Defendant to pay the sum of $30,513.63 to Class Counsel by May 16, 2014. (Docs. 50 and 54). "[R]ather than considering itself fortunate to have escaped punitive sanctions," Defendant filed a motion for reconsideration. (Doc. 57). Defendant's motion was devoid of citations to any intervening change of controlling law or new or overlooked factual matters. *Id.* Accordingly, the Court denied the motion and ordered Defendant to pay the sum of $30,513.63 to Class Counsel by June 30, 2014. *Id.*

On August 1, 2014, Plaintiff filed his Notice of Amended Motion for Class Certification, and on September 16, 2014, the Court granted Plaintiff's Amended Motion for Class Certification and certified a Class consisting of "all persons within the United States whose cellular telephones were called by NCSPlus Inc. using an automatic telephone dialing system with the capacity to store or produce telephone numbers, including, but not limited to, an automated dialing machine, auto-dialer or predictive dialer and/or utilizing an artificial or prerecorded voice, without such persons' prior express consent, between August 31, 2008 and August 31, 2012." (Docs. 64 and 77).

Prior to the scheduled trial of this Action, the Settling Parties met before a mediator, the Honorable Garrett Brown, Jr. (retired), a former United States District Judge in the District of New Jersey, to explore the potential resolution of the claims on a class-wide basis. Soon afterwards, Defendant agreed to explore resolution. These discussions were prompted by the Settling Parties' desire to avoid the burden, expense and uncertainties inherent to protracted litigation, and to put to rest any and all claims or causes of actions that have been, or could have been, asserted against Defendant arising out of the claims contained in the Complaint. To facilitate settlement negotiations, the Settling Parties agreed to the appointment of Judge Brown as a mediator. Judge Brown is well known as a highly skilled and experienced mediator who has mediated many complex cases and class actions. The Settling Parties conducted a mediation session on February 10, 2015 in New York. During this session, the Settling Parties set forth and discussed their respective positions on the merits of the Class claims and the potential for a settlement that would involve class-wide relief. A significant portion of the session was spent discussing Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class in the event that Plaintiff was successful at trial, the presence or lack of a bad faith claim against Continental, and the remaining coverage available under the wasting policy issued by Continental in the amount of $2,000,000.00. The Settling Parties exchanged offers and counter-offers and negotiated the points of each vigorously. Ultimately, the Settling Parties were unable to agree to a settlement during the in-person mediation session.

Following this failed attempt at mediation, Judge Brown continued to keep the Settling Parties engaged in settlement discussions, and he organized and facilitated additional mediation sessions by telephone. Ultimately, the Settling Parties were able to reach a settlement whereby a Settlement Fund in the amount of $1,800,000.00 will be funded entirely from the Continental policy. This amount represents almost all of the remaining coverage under Defendant's wasting policy. This "all in" amount was accepted subject to Plaintiff's confirmation that Defendant has no meaningful assets which could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim does not exist in connection with Continental's handling of a claim for coverage under Defendant's policy.

B. Summary of the Settlement

The Settlement will be funded by a $1,800,000.00 cash payment made by Continental out of the remaining amount of Defendant's liability policy, which was issued in the amount of $2,000,000.00. These funds shall constitute the Settlement Fund, and have already been transferred by Continental to the Escrow Agent.

The detailed terms of the Settlement are set forth in the Stipulation of Settlement. The $1,800,000.00 in cash, less any service award given to Plaintiff, any attorneys' fees, costs and expenses awarded to Class Counsel, and the fees and costs associated with the administration and notice of the Settlement ("**Net Settlement Fund**"), will be distributed to Class Members in accordance with the Plan of Distribution, which is described in the Stipulation of Settlement, Notice of Proposed Settlement of Class Action ("**Notice**"), and on the case website located at www.NCSPlusLitigation.com, as attached to the Settlement as Exhibit A-3.

The Plan of Distribution calls for checks to be issued by the Settlement Administrator to all Class Members in equal *pro rata* amounts of the Net Settlement Fund, which ensures that all Class Members are treated in a fair and equitable fashion.

As set forth below, the Settlement meets the standards for final approval, as it falls well within the range of possible approval, was the product of hard-fought litigation and arm's length settlement negotiations between experienced counsel with the assistance of a well-established mediator, and contains no facial deficiencies.

III. ARGUMENT

A. The Settlement Merits Final Approval

As discussed herein, the proposed Settlement is an outstanding result for Plaintiff and the Class. The Settlement provides a substantial recovery in a case where Plaintiff faced significant hurdles in connection with the recovery of any judgment from Defendant, who has no significant assets, and is certainly within the range of what would be determined to be fair, reasonable, and adequate.

1. The Standards to Be Applied in Granting Final Approval of the Settlement

Federal Rule of Civil Procedure 23(e) requires that any compromise of claims brought on a class basis be subject to judicial review and approval. The issue of whether a proposed settlement should be approved is within the sound discretion of the district court, which should be exercised in the context of public policy strongly favoring the pretrial settlement of class action lawsuits. 2 Herbert B. Newberg, Alba Conte, NEWBERG ON CLASS ACTIONS §11.41 (3d ed. 1992). Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, and falls within the range of approval, preliminary approval is generally granted. *See Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010); *In re Currency Conversion Fee Antitrust Litig.,* No. 01 MDL 1409, 2006 WL 3247396, at *4-*5 (S.D.N.Y. Nov. 8, 2006). Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has noted a strong initial presumption of fairness that attaches to proposed settlements that, as here, are reached by experienced counsel after arm's-length negotiations with the assistance of a mediator. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *Chatelain v Prudential-Bache Sec., Inc.,* 805 F. Supp. 209, 212 (S.D.N.Y. 1992). The general standard by which courts are guided when deciding whether to grant approval of a class action settlement is whether the proposed settlement falls within the range of what could be found "fair, reasonable and adequate," so that notice may be given to the certified class and a hearing for final approval of the settlement can be scheduled. *In re Currency Conversion Fee Antitrust Litigation*, No. 04-cv-5723 (WHP), 2006 WL 3247396, at *5 (S.D.N.Y., Nov. 8, 2006). The Settlement satisfies the criteria for final approval.

2. Final Approval of the Settlement Should Be Granted

The Second Circuit has identified nine (9) factors that courts should consider in deciding whether to grant final approval of a class action settlement, including: the complexity, expense, and likely duration of the litigation; the reaction of the class; the stage of the proceedings; the risks of establishing liability and establishing damages; the risks of maintaining the class action through trial; the ability of defendant to withstand a greater judgment; the range of reasonableness of the settlement fund in light of the best possible recovery; and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *City of Detroit v. Grinnell Corp., et al.*, 495 F.2d 448, 463 (2d Cir. 1974). Each of the applicable *Grinnell* factors also supports approval of the Settlement.

a. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

Courts have consistently recognized the complexity, expense, and likely duration of litigation as critical factors in evaluating the reasonableness of a class action settlement. *See, e.g.*, *Charron v. Weiner,* 731 F.3d 241, 247 (2d DCA 2013); *see also Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2015 WL 728026, at *9 (S.D.N.Y., Feb. 19, 2015) (finding strong basis for approving settlement where prosecuting case for five years "has already imposed significant monetary costs on plaintiffs" which "would have continued to mount had the case proceeded to trial … and, potentially, appeal.").

A significant amount has already been spent in connection with the litigation of this Action, including discovery, expert testimony and two class notices. The parties' opposing positions regarding the merits on the eve of trial ensure that a trial of this matter would only add to the cost and duration of the litigation, and post-trial proceedings in the Court, as well as appeal proceedings, would be a near certainty in the absence of settlement. All of which would result in additional wasting of Defendant's insurance policy – the only viable source of coverage for the claims of Plaintiff and the Class.

In contrast to the aforementioned risks, approval of the Settlement will mean a present recovery for Class Members. While Plaintiff believe that he would ultimately prevail upon his claims at trial, continued litigation would last for an extensive period of time before a final judgment might be entered in favor of the Class. If not for this Settlement, a trial would have occupied additional attorney and Court time, and would have required costly expert testimony from an expert who would have travelled from California. Then, a judgment favorable to the Class, in light of the contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and appeals, which could significantly prolong the lifespan of this case. Delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait even longer for any recovery, further reducing its value as Defendant's defense cost would have further eroded the available coverage under the Continental policy. *See, e.g.*, *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) (delay from appeals is a factor to be considered); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (finding that "[e]ven if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years."). Settlement of this litigation ensures a recovery now and for a larger sum than would be available at the conclusion of a trial and any subsequent motion practice and/or appeals, and eliminates the risk of no recovery at all. It is, therefore, in the best interest of the Class. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

b. The Reaction of the Class to the Settlement

The Settlement is supported by Plaintiff, who has been at the helm of this case since its inception, participated throughout the prosecution of his claims, and was involved in the decision to enter into the Settlement with Defendant. Courts have recognized that a favorable reaction by class members, or the absence of a negative reaction, to a proposed settlement strongly supports final approval. *See Chun-Hoon v. McKee Foods Corp*., 716 F. Supp. 2d 848, 852 (N.D. Cal. 2010). "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004).

In this case, the deadline established by the Court for objections expired on April 23, 2015. The Class was given an opportunity to review and object to both the preliminary notice of settlement and Plaintiff's application for attorneys' fees. *See In re Mercury Interactive Sec. Litig*., 618 F.3d 988, 993-94 (9th Cir. 2010). Of the 137,399 Class Members, not a single objection was received by the Settlement Administrator, while one (1) objection letter was submitted to the Court. (Ferrara Declaration, ¶ 11, attached hereto as Exhibit A; Bertrand Letter, attached hereto as Exhibit B). This one objection, however, is conclusory and devoid of any factual or legal support. This Class Member appears to be dissatisfied with the sum he will receive under the Settlement and asserts that he wants the sum of $20,000.00 to settle his claim. Unfortunately, and as discussed above such a result is not economically possible, and the pool of money being made available to the Class is essentially all of Defendant's available assets.

As evidenced by the attached declaration of an employee of the Class Administrator, the reaction of the Class to the proposed Settlement is overwhelmingly positive, and supports final approval of the Settlement.

c. The Stage of the Proceedings

The stage of the proceedings and the amount of information available to the parties to assess the strengths and weaknesses of their cases is one factor that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir. 1982); *In re Mego Fin. Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The trial of this matter was scheduled to begin within days of the Settlement being reached. Given the stage of proceedings, the parties possessed practically every piece of information that ever would be available to them regarding this matter at the time that Settlement was reached. The information available to Plaintiff and Class Counsel at the time of the Settlement came from the extensive investigation, litigation and preparation for trial of Plaintiff and Class Members' claims, including, *inter alia*: (i) serving written discovery requests; (ii) deposing Defendant's corporate representative; (iii) participating in multiple hearings before the Court; (iv) extensive briefing of the factual and legal matters at issue; (v) expert analysis and evaluation of Defendant's call records; (vi) review of Defendant's bank statements; (vii) review of Defendant's declaration regarding its available assets or lack thereof; (viii) review of Defendant and Continental's correspondence regarding insurance coverage and the defense of this Action; (ix) review of Defendant's trial exhibits; (x) research of the applicable law with respect to the claims asserted in this Action and the potential defenses thereto; (xi) discussion of the Settling Parties' respective positions at mediation; and (xii) negotiating the Settlement with Defendant. The accumulation of the information found in the above sources permitted Plaintiff and Class Counsel to be well informed about the strengths and weaknesses of their case and to engage in effective settlement discussions with Defendant. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("the question is whether the parties had adequate information about their claims"). Therefore, this Court should find that this factor also supports final approval of the Settlement.

d. The Risks of Establishing Liability and Damages

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See In re AOL Time Warner, Inc. & "ERISA" Litig.*, MDL No. 1500, 02 Civ. 5575, 2006 WL 903236, at *11 (S.D.N.Y. April 6, 2006) (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy Inc. Sec. Litig.*, No. 03 civ. 1597 (WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in securities action presented "significant hurdles" to proving liability). While Plaintiff believes that the claims alleged in the Complaint would ultimately be borne out by the evidence, he also recognizes that he could face hurdles to proving liability. Defendant has articulated specific defenses to Plaintiff's allegations, including the pivotal issue of whether Defendant used an automatic telephone dialing system, as defined by the TCPA. Notwithstanding his confidence, Plaintiff recognizes there is no guarantee that he would successfully prove his case at a trial on the merits, or that judgment in his favor would be upheld on appeal.

e. The Risks of Maintaining the Class Action Through Trial

The sixth *Grinnell* factor – the risk of maintaining the class action throughout the trial – is typically considered in the context of cases wherein the plaintiff is seeking unopposed certification for settlement purposes. *See Odom v. Hazen Transport, Inc.*, 275 F.R.D. 400, 411

(W.D.N.Y. 2011) ("Although class certification has been approved by this Court for the purpose of settlement, it is not certain that the case would be certified in the absence of settlement."). In cases where, as here, a class is certified in advance of settlement, the Court has found this *Grinnell* factor to be neutral "given that it was highly unlikely that the previously certified class would subsequently be decertified." *In re Independent Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, at *3 (S.D.N.Y. Sept. 29, 2003). Thus, this factor does not weigh in favor of or against the Settlement.

f. The Ability of Defendant to Withstand a Greater Judgment

A court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement. This *Grinnell* factor weighs heavily in favor of settlement in this case, because, as discussed above, Defendant has no meaningful assets to cover Plaintiff and Class Members' claims beyond its insurance policy. And because Defendant's policy is wasting, the continued litigation of this matter would only lessen the Settlement Fund available to Plaintiff and the Class. As set forth above, Continental will exclusively fund the Settlement Fund with $1,800,000.00, which represents almost all of the money available under Defendant's $2,000,000.00 policy. While Class Members' statutory damages exceed the Settlement Fund, such an amount, if awarded, would not be collectable from Defendant. Thus, further recovery beyond that set forth in the Settlement is extremely improbable, if not impossible.

g. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "range of reasonableness" – a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Given the many risks inherent in continuing to litigate this case, and Defendant's lack of assets beyond the Continental policy, this factor strongly favors the granting of final approval.

IV. THE FORM AND METHOD OF CLASS NOTICE USED TO NOTIFY THE CLASS WAS APPROPRIATE

A. The Scope of the Notice Program

The Settlement Administrator, Angeion Group, mailed the short-form Notice of Proposed Settlement of Class Action, in the form attached to the Stipulation of Settlement as Exhibit A-3, to those Class Members who were previously mailed the Notice of Class Certification and who did not exclude themselves from the Class. The Notice provided an abbreviated, but informative, description of the Action and the proposed Settlement, and also explained how to obtain the more detailed long-form notice, how to access the case-specific website, and how to submit any objections.

The long-form notice was available to Class Members upon request in the form attached to the Stipulation of Settlement as Exhibit A-4, and an electronic version of the long-form notice was posted on the website located at www.NCSPlusLitigationSettlement.com.

B. The Scope of the Notice Program Is Adequate

There are no "rigid rules" that apply when determining the adequacy of notice for a class action settlement. Rather, when measuring the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules of Civil Procedure, the court should look to its reasonableness. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02

MDL 1484 (JFK), 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007). It is clearly established that "[n]otice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *Id.* (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)). In fact, notice programs such as the one used here have been approved as adequate under the Due Process Clause and Rule 23 of the Federal Rules of Civil Procedure in a multitude of class action settlements. *See, e.g.*, *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS), 2007 WL 1191048, at *11 (E.D.N.Y. Apr. 19, 2007) (approving proposed notice program where notice mailed to shareholders of record listed on transfer records and to "more than 2500 of the largest banks, brokerages, and other nominees"); *In re Luxottica Group S.P.A. Sec. Litig.*, No. CV 01-3285 (JBW) (MDG), 2005 WL 3046686, at *2 (E.D.N.Y. Nov. 15, 2005) (approving notice program, consisting of broker mailing and summary notice publication in *The Wall Street Journal* and *The New York Times*).

The notice program was implemented in accordance with the terms agreed upon by the parties and approved by the Court. The Settlement Administrator was provided a list of 137,399 Class Members, which included each Class Member's name and last known address. (Ferrara Decl. ¶¶ 3-4). The Settlement Administrator updated the addresses utilizing the National Change of Address ("**NCOA**") database maintained by the U.S. Postal Service. *Id.* at ¶ 3. On March 24, 2015, the approved Class Notice was mailed to 137,399 Class Members via First Class mail. *Id.* at ¶ 4. The Notice provided each Class Member with pertinent information regarding the case and proposed settlement; their options under the Settlement, including the right to object; and the estimated amount of their settlement payment.

Of the 137,399 Notices mailed on March 24, 2015, the Settlement Administrator received 1,809 Notices returned as undeliverable with forwarding addresses provided. *Id.* at ¶ 5. The Settlement Administrator re-mailed the returned notices to the provided forwarding addresses. *Id.* Of the 137,399 Notices mailed on March 24, 2015, the Settlement Administrator received 26,293 Notices returned as undeliverable with no forwarding addresses. *Id.* at ¶ 6. The Settlement Administrator used locator services to update 3,935 addresses and mailed new Notices to the corrected addresses. *Id.*

The results of the Notice program reflect its success, as a single Class Member submitted an objection letter to the Court.

V. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court enter Final Judgment approving the Settlement; granting Plaintiff's counsel reasonable attorneys' fees of $450,000.00, costs and expenses of $146,116.14, a service award of $10,000.00 to the Class Representative, and such other and further relief as is appropriate under the circumstances.

Dated: June 18, 2015

Respectfully submitted,

MORGAN & MORGAN
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/s/ *John A. Yanchunis*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of June, 2015, I electronically filed the foregoing Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Class Action Settlement with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to Defendant's attorneys-of-record in this matter, who are listed below:

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